International Support Policies to South-East European Countries

Lessons (Not) Learned In B-H

MÜLLER

CHAPTER X

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THE LEGAL SYSTEM

1. Review of the Legal System in B-H

1.1. Constitutional Framework

The Bosnia-Herzegovina Constitution was adopted in a way which was unusual in the constitutional practice within B-H: as a part of the internationally brokered Peace Agreement concluded in Dayton and signed in Paris.[1] That is why it cannot be stated that the Constitution represents 'an expression of the will of the people', as it was not made by legitimate representatives within a legislative body. Nevertheless, by signing up to the Dayton Agreement as a whole, and thereby to its Annex 4, which is the State Constitution, B-H committed itself to implementing the constitutional wording.

The first characteristic of the B-H Constitution is its stipulation that Bosnia-Herzegovina 'shall consist of the two Entities, the B-H Federation and Republika Srpska'.[2] However, the state 'umbrella' was given very limited responsibilities, while numerous prerogatives normally restricted to a sovereign state remained within, or were assigned to, the Entities. The central authorities, under the Constitution, are the Presidency, Parliamentary Assembly, Council of Ministers, Constitutional Court and the Central Bank. These institutions have responsibilities in the following matters: foreign policy, trade, monetary policies, immigration, refugees and asylum seekers, international and inter-entity criminal law enforcement, establishment and operation of common and international communication facilities, regulation of inter-entity transportation and air traffic control.[3] All other matters which were not expressly given to the State fall within the responsibility of the Entities. Hence, the State has no responsibility for law enforcement authorities, armed forces or a central judicial system.

What has very often been criticized in the B-H Constitution, and something which has limited effectively the fight against ultra-nationalist policies in B-H, is legitimized and 'prescribed' discrimination. Namely, the B-H Constitution does not recognize a 'citizen' as a constitutional category, but only 'constituent peoples' as the constituents of the B-H State. It does not give the national minorities a status which could be seen as 'a constitutionally recognized category'. Rather, their existence is suggested through the category of 'Others'. The legitimization of discrimination is reflected, first of all, in a passive voting right, since the B-H Constitution prescribes that the Presidency consists of one Bosniac and one Croat, both directly elected in the territory of the B-H Federation, and one Serb, directly elected in the territory of Republika Srpska.[4] In practical terms, this means that a non-Bosniac/non-Croat from the B-H Federation and a non-Serb from Republika Srpska will never be able to run for

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[1] The B-H Constitution is, in fact, Annex 4 of the Dayton Peace Agreement. For more information about the Agreement see: Chapter III, Dr. Zoran Pajić, *The Role of Institutions in Peace Building (Rule of Law in Bosnia-Herzegovina)*.
[2] Article I 2 of the B-H Constitution
[3] Article III 1 and 2.
[4] Article V

the Presidential elections and/or be elected to the B-H Presidency, which directly runs counter to the ground-rules of fair and free elections.

On the other side, there is no possibility for the entire body of citizens to elect the whole membership of the Presidency. Rather, each voter may vote for one Presidency member, i.e. cast his or her vote in favor of one candidate only. That provision makes a dismantlement of nationalist authorities by way of a democratic procedure extremely difficult or impossible. Importantly, that situation has somewhat improved by the B-H Constitutional Court Decision on the Constituent Status of Peoples in the whole territory of Bosnia-Herzegovina, which stipulates that the constituent peoples are equal in the whole territory of B-H and that the Entity Constitutions must be brought into harmony with both the Decision and the B-H Constitution. To that effect, the High Representative for B-H has appointed Constitutional Commissions in both Entities which will propose changes and amendments to the Entity Constitutions in accordance with the B-H Constitutional Court Decision.

It has often been asserted that amendment of the discriminatory constitutional provisions would, in fact, imply a revision of the Dayton Agreement. However, any questions raised to that end merely obfuscate the whole issue; for no matter how many constitutional provisions could be a subject for objection and criticism, the B-H Constitution contains a section which normally appears in any other constitution, providing both mechanisms and procedures for amending the Constitution.[5] Therefore, it is indeed possible to amend the Constitution through parliamentary procedure and eliminate the legitimized discrimination, while the Dayton Agreement, itself, as an international document, will remain unchanged.

1.2. The Legislative System

At the level of the B-H State, the legislative authority is in the hands of the bi-cameral Parliamentary Assembly. According to the Constitution, the House of Representatives of the Parliamentary Assembly is comprised of 42 members: two thirds are elected from the territory of the B-H Federation and one third from the territory of Republika Srpska. The House of Peoples is comprised of 15 representatives: two thirds from the B-H Federation and one third from Republika Srpska.

The Parliamentary Assembly has the responsibility for enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Parliamentary Assembly; deciding upon the sources and amounts of revenues needed for operations of the B-H institutions, a budget for the B-H institutions, and deciding whether to consent to the ratification of treaties.

Until the inauguration of the new Parliament, the uncompromising interests of the national/nationalist parties which were in power before the November 2000 elections kept the Parliamentary Assembly mainly blocked. For this reason most of the bills necessary for normal functioning of the State either were not made into law or were imposed by the High Representative's decisions issued under the powers invested in him.

In the B-H Federation, the legislative authority is the Parliament which has two Chambers: the House of Representatives and the House of Peoples. In Republika Srpska, the legislature is the National Assembly of Republika Srpska.

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[5] Article X

As has already been stated earlier, the High Representative has broad powers which he may use in the civilian implementation of the Dayton Accords. His initial powers were subsequently broadened by the Peace Implementation Council. Very broad legislative powers were invested in the High Representative at the Peace Implementation Conference in Bonn on 10 December 1997. The purpose was to unblock the legislative bodies and act when the then-ruling national/nationalist parties were not able to reach an agreement on any issue. The Conclusions of the Bonn Peace Implementation Conference empowered the High Representative to issue final and binding decisions with a view to "resolving any difficulties, when the High Representative deems it necessary", and, inter alia, "issuing interim measures which will become effective when the parties are unable to reach an agreement, which will remain in force until the Presidency or the Council of Ministers issues a decision on that issue, in compliance with the Peace Agreement".[6] The High Representative has used his powers on a number of occasions and issued decisions on, for example, common vehicle registration plates, the B-H flag and anthem, judicial and prosecutorial functions in the Federation and the RS, prohibition of deportation of victims of "white slavery", pensions and so forth.

Nevertheless, a feeling of frustration remains due to the lack of a developed strategy for applying legislative powers. As a consequence, no one knows which law or decision is to be given priority; while the legislative authorities fail to reach an agreement, the High Representative continues to use his authority. Furthermore, in drafting the laws to be imposed by the High Representative, little or insufficient consultation is held with domestic, independent legal experts[7] whose knowledge about the domestic legal system and the needs of the B-H society vastly exceeds the information possessed by anyone from the outside. An illustrative example is the Draft Election Law. Although supported fully by all major actors of the international community operating in B-H, it was rejected on two different occasions almost unanimously by the country's legal experts, by most of the political and the majority of civil society representatives (the Draft Law was made under the supervision of the OSCE and was supported by the OHR, Council of Europe and UNMIBH). The Draft Law was criticized mainly because it legitimized discrimination which this Chapter has already discussed. It particularly provided for the discrimination in electing the members of the Presidency by limiting the right to be elected. After the Draft Law was rejected by the Parliamentary Assembly, the High Representative chose not to impose it – which was a very good decision. The Draft Law was returned for revision. However, even after revision, the same discriminatory provisions have remained, which is the major reason why it has never been passed.

1.3. The Judicial System

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[6] Bonn Peace Implementation Conference 1997, Bosnia-Herzegovina 1998: Self-sustaining Structures, Conclusions, Bonn, 10 December 1997.

[7] Examples: Draft Election Law, Draft Defamation Legislation, Law on Access to Information in B-H or Draft Law on B-H Associations and Foundations. The texts of these laws were made in English and translated into the B-H official languages. Further, the technique used in making these laws reveals a strong influence of international schools of law and they are often a result of involvement of legal experts from 'common law' system. Although there is no doubt about good intentions, the legal community here often interprets that as an intrusion into the country's legal system, which may have a negative impact in the long run.

Although it was made under the auspices of the international community and primarily of US diplomacy, the B-H Constitution does not provide any rules for the third branch of the government – the judiciary. As a consequence, no judicial control is exercised over the other two branches of the government. The only court at the level of the State of Bosnia-Herzegovina is the B-H Constitutional Court.[8]

Under the terms of Annex 6 to the Dayton Agreement covering the area of human rights, the B-H Commission for Human Rights was established and is composed of the Office of the Ombudsman for Human Rights and the Human Rights Chamber.[9] The latter has the power to handle grievances by receiving applications concerning alleged violations of human rights only if all other domestic legal remedies have been exhausted; it also issues final and binding decisions which the Parties are obliged to implement.[10]

In regard to the Constitutional Court[11] competencies for human rights issues under the State Constitution, the implementation of the Court responsibilities proved very soon to be overlapping those of the Human Rights Chamber. At the request of the Office of the High Representative, this issue was considered by the European Commission for Democracy Through Law (known as the Venice Commission). The Commission made a Preliminary Proposal for the restructuring of the human rights protection mechanisms in Bosnia-Herzegovina[12]. This document also proposes a merger of the Human Rights Chamber with the B-H Constitutional Court. Two reasons were given: first, the partial overlapping between the competencies of those two institutions is likely to become a factor of "dysfunctioning of human rights adjudication in the country", while the second is that the Human Rights Chamber is a "transitional *sui generis* (quasi-international) institution, the establishment of which was requested by Annex 6 to the Dayton Peace Agreement, pending the accession of Bosnia-Herzegovina to the Council of Europe and ratification of the European Convention on Human Rights (ECHR). The Chamber should, thus, cease its operation after the ratification of the ECHR and the subjection of Bosnia-Herzegovina to the control mechanism of this instrument, namely, the European Court of Human Rights". The Venice Commission Conclusions from 31 March – 1 April 2000 make further recommendations, among which the most important is that the competence for final human rights protection must be given to a single body at the level of the State, which is likely to be achieved by a merger of the Human Rights Chamber with the B-H Constitutional Court. However, the merger should not take place before the ratification of the ECHR. It was further recommended that, *inter alia*, the Parliamentary Assembly should adopt an organic law (on the Constitutional Court), including detailed recommendations for the matters to be covered by that law. Pending the ratification of the ECHR and the adoption of necessary laws and regulations proposed by the Venice Commission, those two institutions should continue to operate in parallel, regardless of the problem concerning 'forum shopping' whereby persons are able to choose between seeking protection from the Chamber or the Constitutional Court.

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[8] B-H Constitutional Court has 6 domestic and 3 international judges. Of that number, 4 judges are elected by the B-H Federation House of Representatives, 2 are elected by the RS National Assembly, and 3 international judges are elected by the President of the European Court for Human Rights, following consultations with the Presidency.

[9] Annex 6 to the Dayton Agreement: Agreement on Human Rights, Chapter II, Part A, Article II 1

[10] Ibid., Part C, Article VIII and IX

[11] Annex 4: B-H Constitution, Article VI 3c

[12] CDL-INF (99) 12

At the Entity level, the judicial authority is organized in the following manner:

a) B-H Federation: municipal courts, cantonal courts, B-H Federation Supreme Court and the B-H Federation Constitutional Court;
b) Republika Srpska: municipal courts, district courts, RS Supreme Court and RS Constitutional Court.

1.4. International Legal Standards and Domestic Legal Tradition

As has already been said, the legal framework for the protection of human rights is provided by the B-H and the Federation (FB-H) Constitutions in a manner which is seen as unusual. The B-H Constitution prescribes that the rights and freedoms set forth in the European Convention on Human Rights and the Protocols thereto 'shall be applied directly in Bosnia-Herzegovina. These acts shall have priority over all other laws'[13], and that B-H and all of its bodies, institutions 'and authorities operated directly by or within the Entities' are obliged to apply the human rights and fundamental freedoms enshrined in the European Convention[14]. Further, fifteen Human Rights Agreements to be applied in Bosnia-Herzegovina are listed in Annex I to the B-H Constitution. However, it remains unclear whether they will be applied in the manner envisaged for the application of the European Convention, although Article II, paragraph 4 prescribes that the enjoyment of the rights and freedoms provided for in the B-H Constitution or the international agreements listed in Annex I to the Constitution will be secured to all persons without discrimination on any ground.

In practice, those provisions mean that the courts of law and other bodies are obliged to apply the European Convention directly. In view of its priority over any other law under the Constitution, in case a law is in contravention of the European Convention, the court and other bodies will apply such law in a manner which conforms to the European Convention[15]. However, despite numerous training programs for judges, prosecutors and legal professionals on the application of the law set forth in the European Convention and other international agreements and treaties[16], there is only a limited number of cases in which regular courts of law have applied directly or called upon the European Convention or any other international agreement. It is mainly the Human Rights Chamber and the Office of the Ombudsman that rely on international law standards.

As many as 27 international human rights protection instruments have become constitutional provisions of the B-H Federation Constitution, while by amendment one more document is included – the Framework Convention for the Protection of National Minorities. The legal status of those instruments is even more unusual. Namely, although all of those agreements are inserted entirely in the B-H Federation Constitution and have become applicable internal law, some of them contain provisions the implementation of which is not possible in B-H on the grounds of their procedural character. Amongst those instruments is, for instance, the European Social Charter, under which the States-Contracting Parties may, at the time when the instrument of

[13] B-H Constitution, Article II 2
[14] Ibid., Article II 6
[15] For example, although B-H Federation and RS Criminal Codes prescribed a death sentence, it could not be pronounced any longer after the B-H Constitution came into force, as it would be in direct contravention of the First Protocol to the European Convention which forbids a death penalty.
[16] Programmes of the International Human Rights Law, Council of Europe, etc.

ratification of the Contracting Party concerned is deposited, select Articles of the Charter by which they will be bound – the selection of Articles is done in accordance with the relevant paragraphs of the Charter. The reason for this possibility is to allow the States to make their own assessment of what is feasible in terms of their economies, without committing themselves to responsibilities they will not be able to fulfil. However, the entire Charter is incorporated in the B-H Federation Constitution, thereby imposing on the economically impoverished B-H Federation additional financial liabilities. On the other hand, while the guarantees of the highest social standards are welcome, a logical question remains as to whether that form of protection of the rights is effective if the social standards are to remain on paper, non-materialized. According to information from the B-H Federation Constitutional Court, this Court has not received a single request for evaluation of constitutionality of a law or a piece of legislation in reference to one of the instruments incorporated in the local Constitutions. This fact confirms an insufficient practice in applying international legal standards in the domestic judicial system.

2. International Support to Judicial Reform in B-H

2.1. Stakeholders and Programs for Legal and Judicial Reform

The necessity of having an independent judiciary and building the rule of law were issues of the highest priority for most international organizations and agencies sent on a mission to B-H or implementing various programs here. The importance attached to an impartial and independent judiciary and elimination of any political interference is reinforced by the Council of Europe's accession requirement.[17]

Various organizations developed manifold approaches to the manner in which these goals could be achieved. Some of the organizations, having focused on institution building programs, worked directly on the establishment of the B-H Federation Constitutional and Supreme Courts[18]. Others focused on the training programs for judges, prosecutors and legal professionals on human rights and any other issues relevant for the judicial and prosecutorial service.[19] Others chose to monitor the judicial system and facilitate the restructuring of judicial system institutional structures[20]. For the needs of this Study we shall provide a review of the activities done by two of the major stakeholders in, *inter alia*, the area of judicial reform and the results achieved in that process: the activities of the Office of the High Representative and those of the United Nations Mission in Bosnia-Herzegovina.

2.1.1. Office of the High Representative (OHR)

The Peace Implementation Council's Bonn Conference[21] concluded that 'an impartial and independent judiciary is essential for the rule of law and reconciliation in Bosnia-Herzegovina'. It also pointed out that the process of appointment of judges

[17] See Chapter III for more details on the situation in the B-H judiciary, *supra* note 1
[18] For example, American Bar Association – Central and East European Law Initiative
[19] International Human Rights Law Group, Council of Europe, OSCE, UN etc.
[20] OHR, OSCE, UNMIBH, Council of Europe
[21] *supra* note 6

should be changed so as to ensure an impartial election, without any political interference, and the necessity to continue judicial training. A special importance was attached to criminal legislation reform in both Entities. In that same document, the PIC requested the establishment of a Commission for Inter-Entity Judicial Co-operation which was to become operational no later than 31 January 1998. The purpose of the Commission was to strengthen co-operation and consistency between the Entities in the area of judicial reform. The Office of the High Representative was empowered to co-ordinate various programs for legal and judicial reforms within a 'coherent and focused program including the harmonization of criminal codes and the criminal procedure codes in both Entities with the B-H Constitution'. The Office of the High Representative urged the Council of Europe, OSCE and UNMIBH to establish co-operation within the judicial and legal reform program and requested particularly from the United Nations Mission to establish a Task Force within UNMIBH which would focus on the evaluation and monitoring of the judicial system.

By its Madrid Declaration [22], the PIC reiterated, *inter alia*, the need for an independent, impartial and multiethnic judiciary and also the establishment of judicial institutions at the State level, in accordance with the Venice Commission opinion.

In pursuance of the set tasks and responsibilities, OHR established a Judicial Reform Unit within OHR's Human Rights and Rule of Law Department. The Unit was entrusted with the implementation of the Judicial Reform Program.[23] This program started from the fact that the problems in the judicial system were not of legal, but rather of administrative or economic nature, which required appropriate activities. It was also stressed that judicial reform was possible only through a shared effort by the judiciary itself - 'internal' effort – and by politicians and the public – 'external' effort.[24]

The OHR decided that the 'political' dimension of the judicial reform should be twofold. Firstly, it would launch activities towards 'the establishment of a political constituent for judicial reform' [25] and secondly, it would facilitate 'that the legal system should become a vehicle of political changes'.[26]

Within judicial reform, OHR set a goal of amending the principles under which the judiciary was to be organized and managed. The first step to achieve that was the adoption of appropriate laws on courts and prosecutor's offices. Although this goal was set as a priority in 1998, the Federation Parliament had not adopted such law even two years later. In the year 2000, the High Representative concluded that the wait-and-see policy could no longer be tolerated and on 17 May 2000 imposed the B-H Federation Law on Judicial and Prosecutorial Service. The Law provides for the 'establishment of independent Federation and Cantonal judicial and prosecutorial commissions which will make recommendations to the parliaments for judicial and prosecutorial appointments and disciplinary action.' [27]

In Republika Srpska, although the domestic authorities, i.e. the RS National Assembly, took action towards removing the direct influence of executive and legislative authorities on the judiciary and prosecution, 'the amendments adopted by

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[22] 16 December 1998
[23] See: http://www.ohr.int/humanrights/jrp.htm
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] OHR, Press Release: *Federation Law on Judicial and Prosecutorial Service*, Sarajevo, 18 May 2000, source: http://www.ohr.int/press/p20000518b.htm. In the pursuance of this Law the Federation Judicial Commission and Federation Prosecutorial Commission and Cantonal Commissions for the Election of Judges (10) and Prosecutors (10) were established.

the RS National Assembly at the last moment undermined the purpose of the Laws'.[28] The said amendments secured the RS Minister of Justice's membership in the judiciary management body – the RS High Judicial Council. However, the High Representative imposed amendments which changed the disputed provisions, thereby excluding the RS Minister of Justice from the Council and giving responsibility for the management of the Council to the RS Supreme Court, as was the case in the B-H Federation.

Concerning institution building and related reform, in essence this meant the provision of funds and sources to the courts and prosecutor's offices necessary for their services. The OHR defined its own task 'to identify the areas in judiciary and prosecution which require capacity-building efforts and to assist donors in extending support in an efficient and timely manner'.[29] OHR assessed that, *inter alia*, the following activities were of extreme importance: implementation of laws in both Entities which regulate the issue of the election of judges; advanced training of judges and prosecutors; both judicial and prosecutorial salaries; formation and strengthening of the Institute for Training of Judges and Prosecutors; strengthening of the prosecutorial role in the process of investigation; 'restore and expand the suspended Commission on Inter-Entity Legal Co-operation'; reform of the prison system; reform of the Schools of Law curricula; dissemination of information to the public about the judicial system, pending reforms and their legal rights; etc.

In addition, on 14 March 2001 the High Representative issued a Decision providing the Independent Judicial Commission (IJC) with a comprehensive mandate. The High Representative established the IJC in November 2000, following the closure of the UN JSAP. Its establishment was based on the Brussels May 2000 Conclusions of the Peace Implementation Council, which requested the formation of an 'international supervisory body for judicial reform, which 'should act as a single, consolidated body which would work on judicial reform in B-H'.[30] The IJC is mandated to carry out the judicial reform and promote the rule of law by way of monitoring and assessing the judiciary and the work of the Entity and Cantonal Commissions and Councils established for the purpose of reviewing the work of incumbent judges and prosecutors and selecting new ones. IJC is also tasked with 'providing assistance and guidance to domestic agencies, including the judicial and prosecutorial commissions and enforcing high standards of ethics and professionalism. It will also oversee domestic training bodies and act as a focal point for international and domestic initiatives for judicial reform.'[31] IJC will also advise the High Representative on all issues from the IJC's mandate and make recommendations for the 'use of his powers under the Dayton Peace Agreement, if necessary'.[32] IJC may also step into the work of the commissions and review councils and suspend a procedure, leading to a final High Representative's decision. And finally, IJC is authorized to have access to information 'available to judges, prosecutors, relevant ministries and commissions and the judicial/prosecutorial review councils.'[33]

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[28] OHR, Press Release: *Amendments to the Law on Judicial Reform in Republika Srpska*, Sarajevo, 12 June 2000, source: http://ohr.int/press/p20000612c.htm In pursuance of this Law, the High Judicial Council and the High Prosecutorial Council were formed.
[29] *supra* note 21
[30] OHR, Press Release: *High Representative gives the Independent Judicial Commission a Comprehensive Mandate*, 14 March 2001.
[31] Ibid.
[32] Ibid.
[33] Ibid.

The IJC director and deputy director are internationals, while the staff consists of international and local legal professionals.[34]

2.1.2. UNMIBH

In responding to the requests of the Bonn Conference and Madrid Declaration, the UN Security Council established by its Resolution No. 1184 of 16 July 1998 the Judicial System Assessment Program (JSAP) which began to work by the end of that same year. This part of the UN Mission in B-H monitored and evaluated the judicial system in B-H within a comprehensive OHR-assisted legal reform program. JSAP's teams were made up of local and international legal professionals who worked throughout B-H. The program ended in November 2000 when the OHR took over the above responsibilities. (According to some unofficial information, the transfer was done under the pressure of the United States, which had conditioned the funding of the UN activities in B-H with the abolishment of that particular program, as judicial monitoring was not a UN mandate.

According to the November 2000 Report[35], after it had taken stock of the situation in the local judiciary during its first year of operation, the JSAP aimed at applying its own expertise in the judicial review process. Thus, UNMIBH proposed that JSAP "should help monitoring and assessment of, and advice to, the Federation Commission and the High Council'. At the same time the High Representative said that 'his Office was expecting JSAP to take the lead in the implementation of the laws pertaining to the election of judges once the laws were in place'. To that effect, by the end of January 2000, UN approved five more positions within JSAP for the purpose of executing that task. In February 2000, a Judicial Review Team (JRT) was established within JSAP; it consisted of a Polish judge, one American legal practitioner, two Norwegian judges, one Finnish judge and another American legal expert. The JRT played an important role in drafting the amendments to the Law on Courts and Judicial Service and the Law on the Public Prosecutor's Office in the RS, as well as the Law on Judicial and Prosecutorial Service, eventually imposed by the High Representative.

2.2. Judicial and legal reform: partnership or paternalism?

The international community's engagement in B-H has contributed significantly to the gradual stabilization of the situation in the post-war period. Very often a whole range of issues were addressed and breakthroughs were made, thanks to the involvement of various international organizations and agencies, specifically those which were empowered directly by the Dayton Agreement to materialize the Peace settlement. The political process was very often blocked by obstruction made by national/nationalist parties which refused to make any compromises or allow any progress, in their attempt to maintain their limitless powers in a situation of frustration and recession, rather than progress. In such a situation the actions taken by the international community were more than positive, representing the only light shining out of the dark reality.

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[34] According to the information received verbally, the internationals are the majority, although the intention is to transfer the Commission to the country's legal professionals.

[35] Thematic Report VII: *JSAP and the Judicial Review Process in Bosnia-Herzegovina*

In parallel, their engagement was facilitated by B-H's being in the focus of many donors who did not hesitate to direct their funds to a variety of programs identified in B-H as a priority. This is true for all aspects of life in B-H, including the legal and judicial system. Since the very beginning of the Dayton peace implementation and the initial announcements of the possibility of B-H's accession to the Council of Europe, it was continually stressed that the accession of B-H to the European family of nations would be possible after this country had adopted a set of laws and built an independent and impartial judiciary.

The international community, notably the OHR, UNMIBH, OSCE, the Council of Europe, and also numerous international non-governmental organizations, devised various approaches and programs with the aim to accomplish those goals. This was mainly training programs for legal professionals, judges and prosecutors and also effective activities at the legislative level, with a view to improving the legal framework and establishing an independent judiciary.

Nevertheless, some oversights did occur and called in question the achievement of the results set by the international community. Namely, local legal experts, and especially judges and prosecutors, had an impression that the programs attacked them for being incompetent in the job they did. That was why the training programs, which were indeed well-intentioned, were sometimes met with resistance against the international organizations involved, rather than with a strong wish to co-operate. Thus, an Interview Study of Bosnian Judges and Prosecutors: Justice, Accountability and Social Reconstruction[36], notably its section explaining attitudes of legal practitioners, judges and prosecutors in B-H towards the international community, reads as follows:

> Participants expressed mixed reactions to the legal training for judges and prosecutors provided by international organizations. Many reported that the training programs were not well-planned, that those conducting sessions were not familiar with Bosnian legal structures and that the training covered too many topics in a limited time…. Some reported that international seminars were not particularly relevant to their work because the trainers and attendees frequently came from different legal systems.
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> Participants expressed criticism of international organizations operating within Bosnia. Opinions varied toward international organizations such as OHR, United Nations and the ICTY, as well as international non-governmental organizations. Participants frequently commented that the representatives of international organizations lacked knowledge about Bosnia and seemed unprepared and uncommitted.[37]

Negative reactions by judges and prosecutors were provoked also by the international monitoring of the Bosnian judicial system and court procedures, the task which was highly prioritized by the international organizations involved. The Study reads as follows:

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[36] The Study was produced by Human Rights Centre, International Human Rights Law Clinic, California University, Berkley and Human Rights Centre, Sarajevo University, May 2000.
[37] Page 18

> ...One participant described international monitors as people without 'good wishes' who were only interested in living in a foreign country for a while. Another experienced as personally adversarial the comments of an international monitor who also was a judge. 'He wanted to irritate me'. This same judge described his other experiences with international visitors to his courtroom as pointless 'because all trials in Bosnia are public. I was curious why they came. It is of little value'.[38]

At the same time some of the highest international officials expressed criticism which went to such lengths as to characterize the Bosnian judiciary as corrupt. The first such statement was made by Mrs. Elisabeth Rehn, UN Special Representative in B-H, in July 1999. The Study reports on how her statement was received within legal and judicial circles:

> ...These judges felt that Rehn's blanket criticism unfairly damaged the credibility of the judiciary. Mrs. Rehn openly said that the courts are corrupt. I do not think that she talks for nothing. But it would be good if she could offer concrete evidence. There are many good judges who are far from that categorization. The other judge asserted that such comments put 'an enormous burden on all judges' since the judicial system was unable to initiate removal proceedings without allegations against specific judges, and thus the accusations encouraged those dissatisfied with a court judgement to claim it was the result of corruption.[39]

The Study states further:

> Further, the participants reported anger and confusion over the criticism by international lawyers who did not appear to understand the legal tradition of civil law countries, or, if they did, were perceived as showing disrespect for the judicial system to which Bosnian legal professionals were devoted. These attitudes, coupled with the decision of the ICTY to combine common law and civil law, to the great confusion of our participants, may lead to a pervasive sense of being practitioners in a second rate system. Judges and prosecutors therefore find themselves on the defensive, powerless in the face of an international community that rejects their beliefs. … Unfortunately, participants perceived international criticism of the Bosnian legal system as an attack on their professional identity. This perception by participants indicates that efforts by international organizations to enhance the professionalism of Bosnian judges and prosecutors should be designed with this vulnerability in mind....[40]

Further, although a legal framework is in place now, which is meant to eliminate fully political influence and pressures on the judiciary, judges and prosecutors still feel themselves to be under pressure both by criminal elements and the international community, particularly after the adoption of the new Entity laws which envisage and request the review of all judges within a defined period of time. Many specifically expressed relief that these laws were eventually imposed and that judges and

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[38] Page 19
[39] Page 20
[40] Page 38, also see Chapter III for more information on the B-H legal tradition, *supra* nota 1

prosecutors were finally granted decent salaries, as well as with the fact that possible political interference with the judicial election and appointment procedure was eliminated. Still, they felt rather frustrated by the fact that their work would be examined and reviewed, supervised by the international community, allowing for the possibility that the High Representative could use his powers, ending in removals.

The judicial and prosecutorial removal procedure is regulated by the laws which were imposed in both Entities by the High Representative. Although a final decision is to be made by the authorities established by these laws, IJC may exert a significant influence and use its own broad powers. This issue has already been discussed above. While this was not an ultimate intention at all, the judges feel an additional pressure which makes them rather discouraged.

Thus, the good will of the international community to help reform the legal and judicial system is obvious. It should be recognized that judges and other legal professionals remain open to those changes. What is the problem then? It is obvious that too often there is a disparity between international and local powers, which effects adversely the evolution process. Various priorities are defined and implemented without sufficient consultation with those on whom a successful reform truly depends. That is the reason why the B-H legal professionals, judges and prosecutors believe that the international community is imposing foreign values and solutions which would be much better if there were more co-operation and partnership involved.

This largely refers to legislative reform as well. Many perceived it as 'an unwelcome intrusion into the country's legal system'. The Study reads as follows:

> ...One participant stated that he would prefer that the international community focus on assisting Bosnia in creating its own institutions rather than intervening in routine matters. Another reported that the representatives of the international community within Bosnia lacked knowledge of, and respect for, the Bosnian legal system and he complained that he had to spend 'half my time explaining basic laws and rules we apply here, which is sometimes a nuisance'.
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> In particular, participants expressed positive and negative attitudes toward OHR. Some viewed it as a thoroughly political institution and expressed frustration with the OHR's changing of the laws. Nevertheless, many felt that OHR ensured political stability. One participant, who criticized certain OHR actions, also noted that without it "we would still be arguing about the size of the letters on passports"...."[41]

The fact is that the drafting of the laws under the auspices of the OSCE or OHR involves mainly foreign experts, while the involvement of domestic legal experts is minimal or quite limited. Examples which could serve for illustration are the Law on Access to Information (enacted), the Defamation Legislation and the Law on Associations and Foundations in B-H (draft). It would become clear to any legal professional in Bosnia, even at first sight, that the laws were not originally drafted in the local language, but that they were a translation from the English text, which provides sufficient ground to assume who had the last say in the drafting of the laws. Further, a new structure and technique are often promoted. As they differ a lot from the legal tradition in B-H, this practice does indeed contribute to resistance among the legal community in B-H. It is often believed that domestic legal experts are used as a

[41] Page 20

'screen' for the international community, while the local influence on the wording of the laws is minimal or none. One of the most recent examples is the Defamation Legislation, which can hardly be understood even by experienced legal practitioners, let alone citizens and others who will be expected to abide by its wording once it has been enacted in the parliamentary procedure. Some legal experts complain that the object of protection is unclear to them, as it seems to them that the legislation protects mainly those who 'commit defamation, slander or libel, but not those slandered'. OSCE is conducting public consultative meetings at which the OSCE internationals make presentations, while little or no attention is given to a profound exchange of opinion with judges and prosecutors who attend those forums.[42] Another example is the Law on Associations and Foundations in B-H, which was made under the auspices of the OHR, and rendered rather poorly in the B-H official languages. This Law has already been presented to the B-H Parliamentary Assembly, without prior consultations with those whose work is regulated by that law – non-governmental organizations and other groups within the civil society sector. Most of these view the Law as restrictive and inappropriate to the civil sector development.

Whilst there is good will on the part of the international community and an ample understanding of the local practitioners of the need to restructure and reform the country's legal and judicial system, 'the wires seem to have crossed' between the international and legal communities in B-H. It also becomes clear that even after five years of quite intensive activities and programs aimed at reforming those systems, notwithstanding the funds spent on their implementation and international experts, the achieved results do not correspond to invested efforts and funds. We could only guess the amount of funds invested. But one thing remains certain: they are not negligibly small, particularly when we take into account the number of international experts working on various programs and in numerous commissions, who are either permanently employed by an international organization or agency or came here ad hoc to stay for a while and work on a particular program. The same could be said of numerous monitors, ranging across the whole spectrum – including those who monitor elections every year and those who monitor judicial proceedings.

Likewise, the lack of knowledge about the Bosnian legal system and tradition, the 'civil law' system and a unilateral imposition of one's own values to implement 'a modern' legal system could not, in itself, yield positive results.

It should, of course, be admitted that the political climate which has prevailed in B-H for years is not conducive to the real reforms. The politicians who tried hard to remain in power at any cost, corrupt and arrogant, did not show any wish for, or interest in, real reforms which could have been implemented by the local potential and expertise. The legal community in B-H, on the other hand, like any other, was entirely unprepared for the huge amounts of international assistance it received, and did not have its own goals and strategies which it could have been offered or requested that they be supported. Requests were made in reference to the poor financial situation in the judiciary, inadequate equipment, lack of funds, low salaries of judges and prosecutors and so forth. No significant proposals or requests were made toward substantial reforms or the setting of their own priorities, which the donor community could support and in accordance with which the directing of assistance could have been sought. That was why the international community did not see the legal community in B-H as its partner in the true sense of the word. Rather, it assumed a

[42] Impressions of judges and prosecutors presented in informal discussions.

paternalistic attitude which continues to deepen frustrations and mutual lack of understanding.

3. What Has and What Has Not Been Achieved?

3.1. Institutions

Great progress has undoubtedly been made in the development of institutions and their modernization, specifically through state-of-the-art information technologies. Nevertheless, it should be stated also that the domestic authorities began very quickly to contribute to this kind of modernization of the judicial institution infrastructure. They have not, however, yet taken over full responsibility for some of the so-called Dayton institutions, such as, for instance, the Human Rights Chamber and the Office of the Ombudsmen in B-H, which continue to be funded by donated monies.

Another good example can be found in the efforts made towards the establishment of judicial authority at the State level, in conformity with the Venice Commission's recommendations. Sadly, obstruction came mainly from "inside", although this is one of the examples in which the international community is making a significant contribution to the strengthening of the state, or the so-called common institutions.

Also, the international community enabled and ensured the establishment and unimpeded functioning of the B-H Constitutional Court and the B-H Federation Constitutional Court. Without external assistance, it is a question when and if these institutions would have become fully operational.

On the other hand, one of the priorities of the OHR Judicial Reform Program – the establishment of the State-level Judicial Training Institute – has not been implemented. Although the activities began almost three years ago, involving different international experts, and although preparations must have cost a lot, there has still been no step forward.

In addition, although the international organizations helped in the formation of some legal associations (of judges and prosecutors in general), no attention has been paid to their strengthening, in order to turn them into a real representative of the legal profession, capable of bringing forth the needs of the legal community. In particular, the legal practice has been ignored, although it also needs a thorough reform which will turn the bar chambers into organizations able to respond to the needs of its members, profession and the public in general.

3.2. Judicial system

It has already been stressed that an independent and impartial judiciary was put high on the international community's agenda and set as one of the accession requirements. The fact is that the laws imposed by the High Representative provide a legal framework which ensures elimination of any political influence on the judicial system. Nevertheless, the international community may influence the decisions on removal of judges through a review procedure, set forth in these laws, including the supervision by, and significant powers of, IJC. On those grounds the question may objectively be posed as to the magnitude of independence of the judiciary from any

external influence, under the international standards for an independent judiciary. There is still a possibility for the relationship between IJC and local commissions and judicial and prosecutorial review commissions to be established and further developed in such a manner which would rely on co-operation and understanding, and which would not call in question one of the basic standards of an independent judiciary – elimination of any external influence on the judiciary, where 'external' refers to everyone outside the judicial authority. Particularly, if that someone has the authority to remove judges and prosecutors on his own, or suspend procedures conducted before commissions and councils or otherwise make final decisions on what the judicial authority should be deciding upon independently and without anyone's influence. For the purpose of strengthening and developing confidence among judges and prosecutors, and citizens too, it would be necessary to develop a partnership relationship between IJC and the commissions and councils, rather than relations based on powers and authorities.

While much credit goes to numerous efforts towards training of legal practitioners, judges and prosecutors in the field of international legal standards, etc., much better results would have been achieved if the programs had been planned in co-operation with the B-H legal community and with respect for the integrity of the Bosnian legal tradition. A continued emphasis on the need for a comprehensive reform of the B-H legal system, without a clear explanation of the new legal standards to be introduced into the country's legal system, does not lead to an efficient dialogue and partnership. Instead, it provokes resistance and frustration, since it is viewed as non-respect for the country's expertise and experience and as an imposition of solutions by use of powers vested in the international community in B-H.

It should be stressed, however, that although often criticized, the training programs served the purpose of what we call 'reconciliation' or which might be termed more precisely as 'the re-establishment of broken ties'. The training programs were viewed by many judges and prosecutors as an opportunity to renew contacts with colleagues across 'boundary lines' and restore mutual trust and co-operation.[43]

3.3. Legal framework

The same could be said for the establishing of a new legal framework which would ensure a smooth transition to democracy. The reform of legal and judicial systems must and may only take place within a broader context of political reform. It is often felt that there is a lack of a carefully planned legal reform strategy on the part of the international community and also a passive attitude in the country's legal community. Naturally, partnership should be established in this aspect as well, for a sheer imposition of international standards, without a real understanding of the country's legal system, its evolution and potential, represents an act of disempowering of the country's forces that are capable of implementing such reforms more efficiently than anyone else. On the other hand, a blanket criticism, without offering any solutions or defining the country's priorities, constitutes no sound basis for an efficient dialogue with the international community.

The international community and some of its representatives are often seen as a group aiming strongly to achieve their own grand results. That impression is based upon the imposed solutions which obviously lack a positive echo in the public or within

[43] IHRLG, ABA/CEELI, Council of Europe etc. report on this.

professional circles. An example is the Election Law which has continually been 'pushed' in a manner which is found unacceptable by most people. Those who are persistently trying to advocate mightily the need for elimination of discrimination in all aspects of life, on any given basis, and full respect for the rights enshrined in the European Convention and other international instruments on human rights, are also trying to impose indirectly an Election Law which would legitimise discrimination and which is unacceptable to most of the citizens, legal professionals and politicians. In particular, this becomes evident in a situation in which the B-H Constitutional Court's Decision on the constituent status of all three peoples throughout B-H is in place, requiring its implementation throughout the entire country, and in which Constitutional Commissions have been formed to propose constitutional amendments. It is obvious that the Election Law, if adopted in its proposed version, would be amended after the constitutional changes, which, in turn, would involve a costly mechanism and procedure. Unfortunately, disagreements with international proposals are often interpreted as 'blocking of the process' or 'the lack of will to bring B-H into Europe' [44], which is yet another form of pressure.

4. Recommendations

4.1. The priorities and strategies for international assistance to the legal and judicial system should be defined exclusively in close co-operation between international stakeholders and the country's legal community, in order to achieve results which would correspond to the investments. This should be the responsibility of the leading international organisations and agencies and the country's legal community.

4.2. It is necessary to develop partnership in the implementation of established priorities in full respect for the country's legal tradition, expertise and experience, and also to apply international legal standards in the B-H legal system and adapt the local system to those standards.

4.3. It will be possible to establish an independent judiciary only in close co-operation with the judicial authorities and in full respect for the dignity and integrity of the judicial and prosecutorial officials. The promotion of independence and depoliticisation of the judiciary should not be done in a manner which calls in question that independence or leaves the impression of a judiciary dependence on the international community. Thus, all principles of judicial independence must be applied equally to those domestic authorities which could exert inappropriate pressures on the judiciary and to the international community which often has broad powers and authority.

4.4. The training programmes intended for the legal communities should be conducted by international professionals who possess a good knowledge of the country's legal system and tradition. It is also necessary to work towards training local legal experts who can eventually take over the training programmes.

[44] Dnevni avaz, 7 April 2001, statement by Ambassador R. Barry and Luke Zahner, OSCE Spokesperson, on the failure of the Council of Ministers to reach a consensus on the Draft Election Law.

4.5. The legislative reform process should be implemented in close co-operation with the country's independent experts and also with professional legal associations whose experience and knowledge of the needs could contribute much to the defining of priorities in legislative reform and responding to the needs of citizens and the society in general.

4.6. In amending or making new laws, no solutions should be inserted which are alien to the B-H legal system or which could cause, in the long run, detrimental consequences for the functioning of the system solely on the grounds of their being 'implanted'. A combination of 'common law' and 'civil law' traditions could easily be confusing and ineffective, unless due attention is paid to the need to adapt certain institutions of one system to the legal tradition of the other system.

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